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In The

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 188

FRANK GUGLIELMINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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In The

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OCTOBER TERM 1969

NO.

FRANK GUGLIELMINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner FRANK GUGLIELMINI requests a writ of certiorari be issued to review the judgment of the UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT, entered April 27th, 1970.

Opinion Below

The opinion of the COURT OF APPEALS not yet reported, is set forth in the appendix.

There was no opinion in the DISTRICT COURT.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

Questions Presented

1. Did the COURT OF APPEALS err in violation of United States v. Toussie, 396 U.S. ___, 90 S. Ct. 858, 25 L. Ed. 2d 156, in extending the tolling of the statute of limitations to a situation not explicitly covered by the Bankruptcy Fraud Statute (18 U.S.C. 3284), where there was a "waiver of discharge" as opposed to a "denial of discharge"?

2. May the government prosecutor repudiate a stipulation made at the trial as to the non-use of a person's Grand Jury testimony, to the detriment of the defense, after the defense has relief upon that stipulation, and offered in person the trial testimony of that particular person?

3. May the government, consistent with principals of equity and fairness, when foreclosed from using a co-defendant's Grand Jury testimony, because of lack of warnings to that co-defendant, seek to use that Grand Jury testimony in the trial of the petitioner by defaulting in its prosecution of the co-defendant, and then not requesting the

trial Court to relieve it of its obligation not to use that transcript?

Statutory Provisions Involved

To the extent relevant, 18 U.S.C. 152 recites:

> "Whoever knowingly and fraudulently conceals from the Receiver ... or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt..."

shall be guilty of an offense.

Section 3282 of Title 18, U.S.C. states:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found when the information is instituted within five years next after such offense shall have been committed." (Emphasis added.)

18 U.S.C. 3284 reads:

> "The concealment of assets of a bankrupt or other debtor shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitation shall not begin to run until such final discharge or denial of discharge." (Emphasis added.)

Statement

Petitioner FRANK GUGLIELMINI was convicted on two counts of concealing the assets of the bankrupt from the Receiver and from the creditors, in violation of 18 U.S.C. 152. Petitioner was the manager of a supermarket grocery store, owned by his brother JOHN, who was the bankrupt in the proceedings.

An involuntary petition in bankruptcy had been filed on April 1st, 1960 by several creditors. A Receiver was appointed, who promptly took control of the business, and liquidated it. Brother JOHN was adjudicated a bankrupt on September 28th, 1960, and directed to file bankruptcy scheduled by October 3, 1960, which he never did.

On February 7th, 1962, the Referee in Bankruptcy entered an order at the request of the Trustee, that the bankrupt had waived his right to a discharge.

The petitioner was indicted June 2nd, 1966. The bankrupt was never indicted.

In holding that the statute of limitations did not begin to run until February 7th, 1962, when the Referee in bankruptcy entered an order that the bankrupt JOHN had waived his right to a discharge, and thus the June 1966 indictment was timely filed, the COURT OF APPEALS wrote:

> "Appellant argued (1) that the tolling provision does not apply to this situation since there was neither a discharge nor a denial of discharge; (2) that the tolling provision

should not apply to a concealment case where the defendant is not the bankrupt; and (3) that if the tolling provision does apply, the period of limitation should have run from October 3, 1960, when the bankrupt failed to file schedules as ordered thereby exposing himself to a finding of waiver. JUDGE DOOLING rejected these arguments and, conceding the law was not clear in the case of a non-bankrupt defendant, ruled that the period of limitations ran from February 7, 1962 because the finding of waiver had the same effect as a denial. We agree.

We reject appellant's first argument because consideration of the 1948 Amendments to 18 U.S.C. 3284 convinces us that Congress could not have intended to exclude waivers of discharge from the tolling provision. On the contrary, a waiver of discharge was intended to have the same effect as a denial.

* * *

Congress subsequently closed the statutory gap by amending the tolling provision as the Court in FRAIDIN (63 F. Supp. 271, 285) had construed. As FRAIDIN himself involved the waiver, rather than denial, of discharge, it is clear to us that Congress intended a waiver to have the same effect as a denial for the purpose of calculating the period of limitation."

At the commencement of the trial the DISTRICT COURT ruled the government could not use co-

defendant TESTA'S Grand Jury testimony for impeachment purposes. The United States Attorney acquiesced: "'...the government will not use the Grand Jury minutes, Your Honor, under any circumstances." (Emphasis added.) When TESTA had appeared before the Grand Jury, pursuant to subpoena, he was not warned as to the nature of the inquiry, that he was a target of the investigation, and that he had the right to consult with counsel. At the close of the government's case, the trial Court entered a judgment of acquittal in favor of TESTA, because of insufficient evidence. Strangely, at this second trial, the government did not introduce most of the incriminating evidence it had used against TESTA in the earlier trial (see 384 F.2d at 604).

Then TESTA testified for GUGLIELMINI and shifted most of the responsibility to himself. Only after the direct examination was completed, and cross-examination commenced, did the government state it was no longer bound by the Court's earlier ruling, and its own agreement, not to use TESTA's Grand Jury testimony. With the use of the Grand Jury transcript, the government successfully impeached TESTA, and shifted most of the criminal responsibility back to the petitioner.

In upholding the use of the Grand Jury testimony, against a defense claim that equitable principals of estoppel do not permit the government to repudiate a stipulation after the defense relied upon it, the COURT OF APPEALS wrote:

> "GUGIELMINI apparently saw in TESTA's acquittal the opportunity to use TESTA as a

defense witness. But although he claims on appeal that TESTA was called to testify in the belief that the government would be barred from using TESTA's Grand Jury testimony on cross-examination, the government used that testimony to impeach TESTA only after Trial Judge ruled that once TESTA was no longer a defendant in the case, the government was free to use its Grand Jury testimony. We agree with the Trial Judge.

* * *

In holding that Grand Jury testimony could not be used to contradict a witness trial testimony on these facts would mean that TESTA would have a license to testify to anything without fear of contradiction and despite his prior sworn statement to the contrary. " If the government did err in failing to give TESTA proper warning before his Grand Jury appearance, there was sufficient remedy of that wrong that the government was barred from using the minutes to incriminate TESTA. No proper purpose would be served in holding that the minutes were also unavailable to the government when they became relevant to impeach TESTA's credibility on a critical factual matter. On the contrary, the use of the Grand Jury Minutes would only serve to impede the search for the truth."

Reasons for Granting the Writ

The opinion of the COURT OF APPEALS extending the tolling of the statute of limitations to a situation not expressly covered by the language of the Act is in violation of the recent opinion of this Court United States v. Toussie, 396 U.S. ___, 90 S. Ct. 858, 25 L. Ed. 2d 156, and also of 18 U.S.C. 3282, which applies the general five year statute of limitations to all situations, "except as otherwise expressly provided by law." The statute of limitations serves an important social policy, and is to be tolled only to those instances in which the Congress expressly provides for its application. Any doubts as to the application are to be applied liberally in favor of the accused, and strictly as against the prosecution.

The opinion of the COURT OF APPEALS extending tolling to a "waiver of discharge," when Congress never so drafted the statute to cover that situation (18 U.S.C. 3284), is simply "Judicial Legislation." This is not a case of interpreting statutory language — it is more like the COURT OF APPEALS acting as if it were a legislative body, and amending the statute. There is a substantial difference between waiver of discharge and denial of discharge. Denial is an adjudication on the merits; waiver is merely an unwillingness to complete the proceedings.

Nor is there any factual basis to the legislative history, as enunciated by the COURT OF APPEALS. House Report No. 304, of the Judiciary Committee, 80th Congress, First Session, which accompanied H.R. 3190 to revise Title 18 of the United States Code generally, makes no mention

of the FREIDIN case (63 F. Supp. 271), and no mention of the "waiver of discharge" situation. Nor does the report show that the Justice Department ever referred to the FREIDIN case in recommending the amendments. See page 165(a) of the report. The COURT OF APPEALS has fashioned "legislative history," when none in fact exist, to support "statutory language" which Congress has not written.

The tolling of the statute of limitations in this and similar situations could cause undesirable consequences. In our situation the Trustee waited sixteen months to apply for a routine waiver, whereas he should have proceeded summarily. 18 U.S.C. 75. Because of the non-action of the Trustee, the statute was tolled for sixteen months to the detriment of petitioner. According to this procedure, it would have been tolled forever. The waiver occurred because the bankrupt, brother JOHN, failed to file schedules, as required, in October, 1960. 11 U.S.C. 25. His adjudication of bankruptcy on September 30th, 1960 operated as an application for a discharge, and would have resulted in a discharge unless promptly filed objections were sustained: 11 U.S.C. 32. The petitioner, not a party to the bankruptcy proceeding, was without standing and powerless to file the schedules or accelerate the waiver. Yet he is burdened with the tolling of the statute of limitations because of the neglect of others to complete the bankruptcy proceeding in the required legal manner.

It is important that this Court review this case to require that the tolling of the statute of limitations, as to any other criminal offense, in

addition to a bankruptcy fraud, be restricted to the few instances which Congress has specified, and that the tolling (if there be one) be restricted to acts within the power and control of the defendant himself, and not be extended to ministerial acts wholly within the power and control of others.

Also the Court should review this case to prevent the government in prosecution from repudiating its own stipulation, when others have relied upon it. The government agreed not to use the Grand Jury testimony because it had failed to give co-defendant TESTA the necessary warnings. That it defaulted in its prosecution of Testa by declining to use much of the evidence it successfully presented in the first trial. With TESTA no longer a defendant, the government used the Grand Jury testimony to impeach him, to the detriment of GUGLIELMINI, when he appeared as a witness, without giving any warning to the defense it no longer felt bound by its earlier stipulation. Equitable principals estoppel should not permit the government to gain advantage to a situation created by its own errors. The government should not be allowed to profit through its own mistakes. Prosecutor should not be allowed to play it so "close to the vest." It is in order for the Court to remind the United States Attorney that he must abide by his trial stipulations, and not seek to secure an advantage by compounding his errors when he could not secure that goal if he acted promptly at all times.

Conclusion

The petition should be granted.

Respectfully submitted

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APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 635—September Term, 1969.

(Argued March 25, 1970 Decided April 27, 1970.)

Docket No. 34311

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FRANK GUGLIELMINI,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
HAYS, *Circuit Judge,* BLUMENFELD, *District Judge.**

Appeal from judgment of conviction by a jury for violations of 18 U.S.C. §152, concealing a bankrupt's assets from a receiver and from creditors, in the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge.*

Affirmed.

Opinion

WILLIAM T. MURPHY, Attorney, Department of Justice, Washington, D. C. (Edward R. Neaher, United States Attorney for the Eastern District of New York, and Denis Dillon, Special Attorney for the Department of Justice, on the brief), *for appellee.*

JEROME LEWIS, New York, N. Y. (H. Elliot Wales, on the brief), *for appellant.*

LUMBARD, *Chief Judge*:

Frank Guglielmini appeals his conviction by a jury in the Eastern District of New York on two counts of an indictment which charged concealment of a bankrupt's assets from his receiver and from his creditors in violation of 18 U.S.C. §152. The assets were concealed while Frank managed the failing Miracle Supermarket for his brother, John Guglielmini, bankrupt owner of the supermarket.

The appellant does not question the sufficiency of the proof as to him, which was substantially the same as that we found ample to support his first conviction on this charge, which we reversed on other grounds. 384 F.2d 602, 604 (1967).

Guglielmini attacks his second conviction on two grounds: first, that he was denied a fair trial by the government's failure to establish a prima facie case against his co-defendant, Frank Testa, coupled with the subsequent use of Testa's grand jury testimony to impeach him when, after having been acquitted by direction of the court, Testa was called as a defense witness; and second, that the statute of limitations barred the prosecution. We find no error and affirm the conviction.

It is claimed by the appellant, and was conceded by the government at argument, that the prosecutor chose not to present at the second trial certain evidence against Testa which had been presented at the first trial. Instead, the prosecutor elected to withhold certain documentary evidence which would have tended to establish Testa's complicity in the running of the supermarket with Frank Guglielmini at the time the concealment of assets was allegedly effected.

There would be no point in our second-guessing what the government might have done in presenting its case against Testa. Whether the conduct of that part of the case was ill-advised or less than competent is outside any proper complaint which Guglielmini can make. So long as there was sufficient evidence to sustain his own conviction, he cannot complain that the government could have made out a stronger case against his co-defendant which might have improved his own chances with the jury.[1]

Testa's acquittal by the court set the stage for Guglielmini's major objection to the conduct of the trial. At the beginning of the trial, Testa's counsel had questioned the anticipated use of Testa's grand jury testimony. When the prosecutor represented to the trial judge that he would not use that testimony, the matter was dropped.

Guglielmini apparently saw in Testa's acquittal the opportunity to use Testa as a defense witness. But although he claims on appeal that Testa was called to testify in the belief that the government would be barred from using

1 Of course, if the trial judge had denied Testa's motion for an acquittal, or even had reserved judgment, Testa would still have been a defendant and could have testified only on his own election. And if he had testified as a defendant, it is unlikely he would have colored his testimony so as to assist Guglielmini's defense, as he could safely do after his own acquittal.

Testa's grand jury testimony on cross-examination, the government used that testimony to impeach Testa only after the trial judge ruled that once Testa was no longer a defendant in the case, the government was free to use his grand jury testimony. We agree with the trial judge.

The government's representation before trial concerning its intention not to use the grand jury testimony could refer only to its potential use as part of the government's direct case. But once the case against Testa was ended by his acquittal, which the government certainly could not have foreseen before the court so ruled at the conclusion of the government's case, the reasons for barring use of the testimony no longer existed. Any claim of infirmity in Testa's grand jury minutes was available only to Testa. It follows that when Testa was called to the stand by Gugliolmini, it was altogether proper to allow the government to show the jury that on a prior occasion, when Testa had been under oath, he had sworn to a somewhat different version of the roles he and Gugliolmini had played in the operation of the supermarket.

On direct examination, Testa told the jury, as he had at the first trial, that he had managed the store, signed checks, received cash, and was responsible for the supermarket's financial operations. Naturally, this testimony would have aided Gugliolmini considerably if it remained unimpeached. Testa had told the grand jury, however, that he had run the business for John Gugliolmini until Frank Gugliolmini came into the picture and that he exercised no control after that time. The effect of that testimony was to put appellant in sole control of the supermarket during the crucial period when assets were being concealed.

A holding that grand jury testimony could not be used to contradict a witness' trial testimony on these facts would

mean that Testa would have had a license to testify to anything without fear of contradiction and despite his prior sworn statement to the contrary. If the government did err in failing to give Testa proper warnings before his grand jury appearance, it was a sufficient remedy of that wrong that the government was barred from using the minutes to incriminate Testa. No proper purpose would be served in holding that the minutes were also unavailable to the government when they became relevant to impeach Testa's credibility on a critical factual matter. On the contrary, to forbid use of the grand jury minutes would only serve to impede the search for the truth.

Appellant's second argument is that the prosecution of this indictment, filed June 2, 1966, was barred by the statute of limitations, 18 U.S.C. §§3282, 3284. Judge Dooling held that the period of limitation began to run on February 7, 1962, when the order of the referee in bankruptcy held that the bankrupt, John Guglielmini, had waived his right to a discharge, and accordingly the indictment was timely filed within five years of that date. We agree with the district court.

Several creditors of the Miracle Supermarket filed an involuntary petition in bankruptcy on April 1, 1960. A receiver was appointed that day. John Guglielmini, doing business as the Miracle Supermarket, was adjudicated a bankrupt on September 28, 1960, an action which constituted an automatic application for a discharge under the Bankruptcy Law, 11 U.S.C. §32(a). The receiver was appointed trustee of the bankrupt estate, which was ordered to file bankruptcy schedules by October 3, 1960. It does not appear any schedules were ever filed.

On January 24, 1962 the trustee moved for an order that the bankrupt had waived his right to a discharge. He al-

leged there had been a first meeting of creditors, but there were numerous adjournments and the bankrupt had failed to appear on several occasions. The bankrupt not having opposed the motion, the referee on February 7, 1962 ordered that the bankrupt had waived his right to a discharge. We think that date must be used to measure the period of limitation.

The five year general statute of limitations, 18 U.S.C. §3282, is tolled for a charge of concealing assets of a bankrupt until the bankrupt obtains a "final discharge or denial of discharge." 18 U.S.C. §3284. The problem here is that while the Bankruptcy Law, 11 U.S.C. §32, provides for discharge, denial of discharge, or *waiver of discharge*, Congress failed to provide expressly for tolling the statute where, as in this case, there is a waiver of discharge.

Appellant argued (1) that the tolling provision does not apply to this situation since there was neither a discharge nor a denial of discharge; (2) that the tolling provision should not apply to a concealment case where the defendant is not the bankrupt; and (3) that if the tolling provision does apply, the period of limitation should have run from October 3, 1960, when the bankrupt failed to file schedules as ordered and thereby exposed himself to a finding of waiver. Judge Dooling rejected these arguments and, conceding the law was not clear in the case of a non-bankrupt defendant, ruled that the period of limitations ran from February 7, 1962 because the finding of waiver had the same effect as a denial. We agree.

We reject appellant's first argument because consideration of the 1948 amendments to 18 U.S.C. §3284 convinces us that Congress could not have intended to exclude waivers of discharge from the tolling provision. On the contrary, a waiver of discharge was intended to have the same effect as a denial.

In 1945, six men had been prosecuted for concealment of assets in the District of Maryland. At that time, the statute governing the period of limitation read: ". . . concealment of assets . . . shall be a continuing offense until the bankrupt shall have been finally discharged, and the period of limitation . . . shall not begin to run until such final discharge." Because there had never been an application for a discharge, and the time to apply for a discharge had expired,[2] the trial court faced a situation where the statute of limitations would never run under the strict wording of the tolling section, since there was no longer a possibility of "final discharge." The district court held that the intent of Congress could be followed only by reading the tolling provision as if the words "or until denial thereof" were appended to "final discharge." *United States* v. *Fraidin*, 63 F. Supp. 271, 285 (D. Md. 1945). Congress subsequently closed the statutory gap by amending the tolling provision as the court in *Fraidin* had construed it. As *Fraidin* itself involved a waiver, rather than a denial, of discharge, it is clear to us that Congress intended a waiver to have the same effect as a denial for the purpose of calculating the period of limitation.

Appellant's second point merits little discussion. The argument appears to be that since appellant was not the bankrupt, and therefore had no control over the bankruptcy procedure which would have caused the statute of limitations to start running, the tolling provision does not apply to him. But concealment of assets is a crime even when, as here, the defendant is not the bankrupt. We see no reason why a defendant who is not the bankrupt should be in

[2] In 1945, bankrupt individuals and corporations had to make formal applications for discharge. Subsequently, 11 U.S.C. §32(a) was amended so that, in the case of an individual, adjudication of bankruptcy operates automatically as an application for a discharge.

a better position than a defendant who is the bankrupt with regard to the tolling provision.

Finally, appellant argues that the period of limitation should be calculated from the date the bankrupt's action (or here, his inaction) exposed him to a finding that he had waived discharge. Presumably, the date for calculation under this theory would be October 3, 1960, when the bankrupt failed to file schedules. We disagree. In *Fraidin*, the court looked to the date when discharge was barred as a matter of law. *Supra*, at 284. We follow that approach and note that the only action in this case which irrevocably barred discharge was the order of waiver on February 7, 1962.

Appellant's reliance on *United States* v. *Rudin*, 254 F.2d 45 (6th Cir.), cert. denied, 357 U.S. 930 (1958), is misplaced and, in our view, works against his argument. In *Rudin*, a corporation was adjudged bankrupt in January, 1950. When it failed to apply for a discharge within the six months allowed under 11 U.S.C. §32(a), it was deemed to have waived discharge as of July, 1950 and the period of limitation was held to run from that date. Appellant argued that *Rudin* supports the proposition that the period of limitation should be measured from the *acts* giving rise to the waiver, *e.g.*, the failure to file schedules in October, 1960. But the government properly points out that *Rudin* is more consistent with the view that the period of limitation runs from the date of the event when discharge becomes impossible and, as we noted above, that event in the instant case was the finding of waiver on February 7, 1962.

Judgment affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1615

FRANK GUGLIELMINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of concealing from a receiver and from creditors the assets of a bankrupt, in violation of 18 U.S.C. 152. The court of appeals affirmed (Pet. App. 1a-8a).

Petitioner contends in his petition, as he did below, that the government was improperly permitted to escape from a stipulation not to use the grand jury tes-

timony of a witness, and that the statute of limitations had expired prior to indictment, since the tolling provision (18 U.S.C. 3284) does not in terms provide for tolling the running of the period of limitations under 18 U.S.C. 152, where, as here, there is a *waiver* of discharge by the bankrupt as opposed to a "denial of discharge." These contentions are thoroughly treated and answered in the opinion of the court of appeals, on which we rely. We note only that, contrary to petitioner's assertion, nothing in *Toussie* v. *United States*, 397 U.S. 112, which dealt with the "continuing offense doctrine," casts doubt on or is inconsistent with the court of appeals' holding that Congress intended the statute of limitations under 18 U.S.C. 152 to be tolled by a waiver of discharge, which has precisely the same effect as a denial. In contrast to the situation in *Toussie*, the holding below is different from a finding, in questionable circumstances, that 18 U.S.C. 152 prescribes a continuing offense—a matter affirmatively and explicitly established by the first clause of 18 U.S.C. 3284. Rather, it simply represents a determination that, under the second clause of Section 3284, Congress intended to interrupt the running of the limitations period in situations such as that here involved.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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